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No. 08-791

In The
Supreme Court of the United States

H & N PLANNING AND CONTROL, INC.,
Petitioner,

v.

CITY OF ST. PETERS, MISSOURI, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit correctly determined that Petitioner lacked third-party standing to advance a First Amendment retaliation claim under 42 U.S.C. § 1983 where Petitioner conceded it engaged in no First Amendment activity and where the rights holder, Brian Hodak, failed to appeal the District Court's judgment finding that he had suffered "no actionable constitutional violation"?

DISCLOSURE STATEMENT

Respondents herein are the City of St. Peters, Missouri (the "City") and its former mayor, Thomas Brown (collectively "Respondents"). As the City is a governmental entity, no disclosure per Rule 29.6 is required.

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INTRODUCTION

The Petition presents no compelling reason supporting exercise of this Court's jurisdiction. Rule 10.[1] Petitioner does not suggest the opinion of the Eighth Circuit is in conflict with the decision of another United States Court of Appeals, but concedes the Eighth Circuit relied "upon a trend within other circuits." Petition at 7.[2] Petitioner acknowledges the Eighth Circuit applied this Court's decision in Powers v. Ohio, 499 U.S. 400 (1991), but complains the Eighth Circuit misapplied Powers to the facts of this case. Certiorari generally does not lie where the petitioner complains of misapplication of the applicable precedent. Rule 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

The Petition should be denied because the Eighth Circuit's July 30, 2008 opinion (the "Opinion") correctly applied this Court's precedent, stated in Warth v. Seldin, 422 U.S. 490 (1975) and Powers v. Ohio, 499 U.S. 400 (1991), to deny Petitioner third-party standing. Petitioner concedes it engaged in no First Amendment activity. The Eighth Circuit held Petitioner lacked standing because the rights holder who engaged in First Amendment activity—Brian Hodak—was not hindered in pursuing his retaliation claim and because the District Court ruled Brian did

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[1] The Rules of the Supreme Court of the United States are referred to herein simply as "Rule."

[2] II/N Planning & Control's Petition for Writ of Certiorari is referred to herein as "Petition" and cited as "Pet."

not suffer an "actionable constitutional violation." Opinion, Appendix to Pet. (herein "App."), p. 8. Brian did not appeal the District Court judgment against him. The Opinion correctly applies this Court's precedent and is consistent with decisions of the United States Court of Appeals for the First, Third, Seventh, Eighth, Ninth, and Eleventh Circuits on similar facts.

COUNTERSTATEMENT OF THE CASE

The facts of this case are set forth in the Opinion in a light most favorable to Petitioner. Petitioner's Statement of the Case (Pet. 2-6) omits two important facts. The first omitted fact is that the District Court entered judgment against Brian on his claim for First Amendment retaliation because it concluded Brian did not suffer an "actionable constitutional violation." App. 8. The second omitted fact is that Brian did not appeal that adverse judgment. Id.

At trial, the jury found in Brian's favor but awarded no damages. Respondents moved for judgment as a matter of law on Brian's claim, and the District Court entered judgment against Brian, holding the evidence at trial showed the alleged acts of retaliation were "not sufficiently severe so as to raise to the level of an actionable constitutional violation." Id. Brian did not appeal this ruling. Id. In addition to finding that Petitioner did not satisfy the Powers third-party standing requirements, the Eighth Circuit concluded "we would decline to extend third-party standing to H/N to assert Brian's nonexistent legal claim." Id. at 16.

Petitioner ignores the District Court's conclusion that Brian suffered no actionable rights violation as well as the fact that Brian did not appeal the adverse judgment. Petitioner also misstates the facts. Petitioner asserts "Brian and Karla had obtained a 1.5 million dollar judgment against Defendants." Pet. 12. This is an incorrect factual statement. Brian did not obtain any judgment; rather, judgment as a matter of law was entered in favor of Respondents on his claim. Karla did not obtain a judgment; she was not a party to the case at the time of the second trial and did not submit any claims to the jury. Petitioner also asserts that "judgment was not entered on behalf of the claim of Brian Hodak, based upon damages." Pet. 11. In fact, as the Eighth Circuit observed, "[b]ecause Brian did not suffer an 'actionable constitutional violation,' the district court concluded that [Respondents] were entitled to judgment as a matter of law with respect to Brian's claim." App. 8.

REASONS FOR DENYING THE PETITION

I. BRIAN HODAK SUFFERED "NO ACTIONABLE CONSTITUTIONAL VIOLATION." IN LIGHT OF THE UNAPPEALED DISTRICT COURT JUDGMENT, THERE CAN BE NO ERROR IN DENYING PETITIONER STANDING TO ASSERT BRIAN HODAK'S NONEXISTENT FIRST AMENDMENT RIGHTS.

As stated *supra*, judgment as a matter of law was entered in favor of Defendants and against the rights holder, Brian, on his First Amendment retaliation claim.

Brian suffered no deprivation of rights; as recognized by the Eighth Circuit, his First Amendment rights were not violated. Brian zealously advocated his claim and lost. The Eighth Circuit correctly concluded "Brian has no rights that [Petitioner] may assert, and we would decline to extend third-party standing to [Petitioner] to assert Brian's nonexistent legal claim." App. 16.

II. THE OPINION OF THE EIGHTH CIRCUIT IS A PROPER APPLICATION OF THIS COURT'S APPLICABLE PRECEDENT STATED IN POWERS V. OHIO AND IS CONSISTENT WITH THE APPLICATION OF POWERS BY OTHER CIRCUITS. THE OPINION DOES NOT DECLARE ANY "ABSOLUTE RULE" AS SUGGESTED BY PETITIONER, BUT RATHER CORRECTLY APPLIES THE POWERS THREE-PART TEST TO DENY STANDING TO PETITIONER.

Petitioner's Question Presented suggests the Eighth Circuit's application of Powers v. Ohio conflicts with this Court's opinion in Warth v. Seldin. The Eighth Circuit's application of Powers is consistent with Warth and consistent with the holdings of the other federal circuits addressing similar facts.

A. The Eighth Circuit Properly Applied This Court's Precedent On Third-Party Standing

Petitioner contends that Warth and Powers are inconsistent, and that applying Warth to the facts of this case compels a different outcome. According to Petitioner, this Court, in Warth, "made clear that

when government action directly or indirectly violates the rights of third parties, then multi-party plaintiff claims are allowed." Pet. 10. Petitioner asserts that its case "could not be more clearly aligned with that precedent." Id.

Petitioner suggests that because it alleged an injury, it necessarily had standing. Pet. 10. Warth contradicts Petitioner's logic: "[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." 422 U.S. at 499. In Warth, this Court specifically held "the claim of these petitioners falls squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." Id. at 509.

In Warth, local taxpayers claimed third-party standing to challenge local zoning laws excluding low and moderate income persons. This Court recognized that taxpayers of the local government were not "themselves subject to [allegedly unconstitutional] zoning practices" and that their claim rested on the violation of "constitutional and statutory rights of third parties, namely, persons of low and moderate income who are said to be excluded." Id. at 509, 510. In addressing whether the taxpayers established an exception to the prudential limitations of standing, this Court outlined a third-party standing test that, sixteen years later in Powers, it would apply again. The Warth Court held that "[n]o relationship, other than an incidental congruity of interest, is alleged to

exist between the ... taxpayers and persons who have been precluded from living" within the locality. Id. at 510. Further, this Court held "there is no indication that persons who in fact have been excluded ... are ***disabled from asserting their own right in a proper case***." Id. at 510 (emphasis supplied).

One year after Warth, this Court again addressed the issue of third-party standing in Singleton v. Wulff, 428 U.S. 106 (1976). In that case, physicians challenged the constitutionality of a law they claimed violated the constitutional rights of their patients. This Court found a sufficient "injury-in-fact" (id. at 112-13), a sufficiently close "relationship between the litigant and the third party," (id. at 115), and a "genuine obstacle" to the third party's own litigation. Id. at 115-16.

In Powers v. Ohio, the Supreme Court specifically and clearly relied on Singleton as the prior decision from which it derived the three criteria used in evaluating third-party standing. 499 U.S. at 410-411 (quoting Singleton, 428 U.S. at 112, 113-116). The Powers Court held that to allow third-party standing, "three important criteria" must be met: 1) an "injury in fact"; 2) a "close relation to the third party"; and 3) a "some hindrance to the third party's ability to protect his or her own interests." Id. at 411.

In Powers, this Court considered "whether a criminal defendant has standing to raise the equal protection rights of a juror excluded from service." Id. at 410. In analyzing the "hindrance" prong, this Court assessed the "likelihood and ability" of the excluded jurors to pursue their own claims. Id. at 414. The Court assessed the "barriers to a suit" faced by a

hypothetical juror. Id. at 414 ("[A] juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights.")

The Eighth Circuit faced a far simpler task in this case in assessing the likelihood and ability of the rights holder, Brian, to assert his own rights. "Brian had no practical obstacles that prevented him from bringing his First Amendment claim. In fact, he brought his own claim before the district court." App. 13. Brian "voluntarily withdrew himself as a named plaintiff in the first trial, but prior to the second trial, in the third amended complaint, Brian asserted his First Amendment retaliation claim yet again." Id. Brian "persisted in the claim throughout the second trial." Id. at 13-14. As acknowledged by Petitioner, "[e]very incentive in the world existed" for Brian to pursue his claims. Pet. 10.

Petitioner contends that in Kowalski v. Tesmer, 543 U.S. 125 (2004), this Court "reaffirmed the principle that 'prudential standards' are not 'absolute,'" arguing that the Eighth Circuit applied the third-party standing test as an "absolute rule." Pet. 8 (quoting Kowalski at 129, 130). Petitioner misreads Kowalski and this Court's third-party standing jurisprudence. In Kowalski, this Court recognized the general rule "that a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties," and confirmed that "[w]e have not treated this ["general rule"] as absolute." 543 U.S. at 129-130. In Kowalski, this Court recognized that third-party standing constitutes an "exception" to the general rule which requires a party to assert his or her own legal

rights and interests. The Court noted "there may be circumstances where it is necessary to grant a third party standing to assert the rights of another." Id. at 129-130. Ultimately, the Kowalski Court reaffirmed the long-standing position of the Court: "[W]e have not looked favorably upon third-party standing." Id. at 130.

Third-party standing of the type asserted by Petitioner is an "exception" to the general rule that requires a party "assert his own legal rights and interests." In order to permit the exception and allow third-party standing, the Court requires a showing of "a 'close' relationship with the person who possesses the right" and evaluates "whether there is a 'hindrance' to the possessor's ability to protect his own interests." Id. at 130 (citing to Powers). The Kowalski Court applied Powers and found that plaintiffs failed to satisfy both the close-relationship and hindrance prongs.

In analyzing the "hindrance" prong, this Court in Kowalski rejected the argument of plaintiffs that pro se criminal defendants were "hindered" in protecting their constitutional rights to counsel allegedly abridged under the Michigan laws governing criminal appeals. Id. at 131. The Court cited to examples where pro se criminal defendants had, in fact, pursued challenges through the court system. This Court noted that three indigent criminal defendants were originally plaintiffs in the action, but their claims were dismissed because they "had ongoing state criminal proceedings and ample avenues to raise their constitutional challenge in those proceedings." Id. at 133; see also Mainstreet Organization of Realtors v. Calumet City, 505 F.3d 742, 747 (7th Cir. 2007)

(Posner, J.) (citing Kowalski and stating: "As there is no hindrance to the primary victims' enforcing their rights, there is no reason to allow the brokers into the litigation arena.").

The Eighth Circuit's Opinion is perfectly consistent with this Court's opinions in Warth, Singleton, Powers and Kowalski.

Furthermore, the Eighth Circuit did not go beyond what this Court's precedent holds. Petitioner contends the Eighth Circuit fashioned an "absolute rule" that holds "participation of the one whose rights were violated eliminates all jurisdiction over all other parties." Pet. 8. No absolute rule was formulated. The Eighth Circuit carefully reviewed whether Petitioner adequately presented the "two additional showings" required by the third-party standing exception. App. 11-14. The Eighth Circuit found that Petitioner failed to establish the hindrance prong. It clearly found "Brian had no practical obstacles that prevented him from bringing his First Amendment claim." App. 13. As noted by the Eighth Circuit, Brian provided compelling evidence that no "practical obstacles" confronted him by bringing "his own claim before the district court." Id.

B. The Eighth Circuit's Application Of This Court's Third Party Standing Jurisprudence Is Consistent With Other Circuits

The Eighth Circuit correctly recognized that Brian, the rights holder, faced no hindrance to protecting his own interests. Consistent with prior opinions of the

First, Third, Eighth, Ninth, and Eleventh Circuits,[3] the Eighth Circuit recognized that "if a third party actually asserts his own rights, no hindrance exists, and third-party standing is improper." App. 12.

The Opinion is entirely consistent with prior circuit precedent, Ben Oehrleins and Sons v. Hennepin County, 115 F.3d 1372 (8th Cir. 1997), *cert. denied* 522 U.S. 1029 (1997), where the court held that a group of plaintiffs ("customers of waste haulers") lacked standing to assert the Commerce Clause claims of waste haulers because "prudential considerations bar them from maintaining this action." Id. at 1382. In applying the "third-party standing doctrine described in Warth," the court found the waste haulers suffered no barrier to suit because they "aggressively litigated their own claims," demonstrating "that they are fully capable of asserting their own rights." Id. at 1381. The customers thus failed the third-prong of the Warth/Powers third-party standing test by failing to show some hindrance existed to the waste haulers' ability to act and the likelihood that they would act to protect their own interests.

The Eighth Circuit's application of Powers, as noted in the Opinion, is consistent with the decisions of the First, Third, Ninth, and Eleventh Circuits. See Benjamin v. Aroostook Medical Ctr., Inc., 57 F.3d 101, 106 (1st Cir. 1995) ("Here, the injured party is clearly identified and has sufficient interest in the litigation ... to pursue (and, in fact has pursued) the action."); Philadelphia Marine Trade Ass'n v. Comm'r, 523 F.3d 140, 145 (3rd Cir. 2008) (Here, however, the [third

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[3] As cited in the Opinion, App. 8-10.

party] is not only willing to sue on its own behalf—it *has* sued.") (emphasis in original); Wedges/Ledges of Calif., Inc. v. City of Phoenix, 24 F.3d 56, 62 (9th Cir. 1994) ("[T]he very participation of the [third party] in this suit demonstrates that there is no hindrance to [their] ability to protect their own interests."); and Knight v. Alabama, 14 F.3d 1534, 1554 (11th Cir. 1994) ("[N]ot only was there no obstacle to [the third parties] asserting their rights for themselves, but, in fact, they were already doing so.").

There is no compelling reason for this Court to grant certiorari. The Eighth Circuit applied the well-established test for third-party standing from Powers, which is being consistently applied by the federal circuits. The Petition for Writ of Certiorari should be denied.

C. Misstatements Of Fact Or Law

Pursuant to Rule 15, counsel are directed to bring to this Court's attention any misstatements of fact or law, even if those misstatements are merely "perceived." Petitioner has consistently misstated the holding of the Eighth Circuit, as follows: that it "held that the participation of Brian Hodak in the lawsuit prohibited jurisdiction over any other plaintiff;" that it "held that participation in the lawsuit by the one whose rights were violated, conclusively and absolutely prohibited jurisdiction over any other party;" and that it created an "absolute rule" that "participation of the one whose rights were violated eliminates all jurisdiction over all other parties." Pet. 6-8. Petitioner overstates the Opinion's holding. The Eighth Circuit held that Petitioner lacked standing to assert Brian's First Amendment claim. The holding is thus that one

party (Petitioner) lacked standing to assert one claim (Brian's First Amendment claim).

Petitioner also argues that the Opinion was based solely on the hindrance prong from Powers. The Opinion was not so limited. The Eighth Circuit stated: "Even if we were to conclude that Brian was hindered in asserting his rights, we would conclude that H/N lacks standing nonetheless." App. 15. In evaluating the "hindrance" prong of Powers' third-party standing analysis, the Eighth Circuit assumed, without deciding, that Petitioner had suffered an injury-in-fact and had a sufficiently close relationship with the rights holder, Brian. App. 13. The Eighth Circuit did not affirmatively find that Petitioner had suffered an injury-in-fact or had a sufficiently close relationship with its employee, Brian. Rather, the Eighth Circuit proceeded to the clearest issue, the hindrance prong of the Powers analysis.

The Eighth Circuit further recognized that Petitioner failed to satisfy the initial element of third-party standing—that the underlying rights-holder has a constitutional claim. The District Court concluded Brian suffered "no actionable constitutional violation." Brian did not appeal that judgment. App. 15. Petitioner cannot show Brian suffered any constitutional injury and therefore, as succinctly stated by the Eighth Circuit, "Brian has no rights that H/N may assert, and we would decline to extend third-party standing to H/N to assert Brian's nonexistent legal claim." App. 16.

CONCLUSION

The First Amendment rights holder, Brian Hodak, pursued his claim for three years through two jury trials and was ultimately adjudicated to have suffered "no actionable constitutional violation." Brian did not appeal this ruling. Petitioner, Brian's employer, conceded it did not engage in First Amendment activity. Petitioner failed to present evidence showing that Brian suffered some hindrance in his ability or likelihood to protect his own interests and the Eighth Circuit correctly held on this basis that Petitioner had no standing to assert Brian's "nonexistent" claim.

There is no compelling reason for this Court to grant certiorari. Petitioner does not even argue that one of the reasons set forth in Rule 10 exists, but rather takes issue with the Eighth Circuit's application of a properly stated rule of law. Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,
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